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Supreme Court, U.S.
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No. 04-582

In the

Supreme Court of the United States

RUI ONE CORP., a Washington corporation,

Petitioner,

v.

CITY OF BERKELEY, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. The Equal Protection Clause requires that regulations of economic pursuits be "rationally related to a legitimate government interest." This Court has explained that under this standard "we insist on knowing the relation between the classification adopted and the object to be attained . . . . [and] a law will be sustained if it can be said to advance a legitimate government interest." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Did the court below err in holding that the rational relationship standard gives the legislature "virtually unreviewable" discretion to regulate economic matters? *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155 (9th Cir. 2004).

2. A city law applying to only one business requires that the business pay employees $11.37 per hour. Is this rationally related to the government's interest in alleviating the plight of the working poor?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. PLF's Economic Liberty Project protects the right to earn a living both through direct litigation and by participating as amicus curiae in appellate courts. PLF has participated as amicus curiae in cases such as *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) and *Bank of America v. San Francisco*, 309 F.3d 551 (9th Cir. 2002). PLF also participated as amicus in support of the petition for rehearing in this case. Because of its history and expertise with regard to economic liberty and the right to earn a living, PLF believes its perspective will aid this Court in considering the petition for certiorari.

SUMMARY OF ARGUMENT

The Berkeley Living Wage Ordinance ("LWO") requires any business leasing property from the city, employing more than six people, generating $350,000 in annual income, and which does not already have a collective bargaining agreement with a union, to pay its employees $11.37 per hour (or, if it provides employees with health benefits, $9.75 per hour). The Marina Amendment, which is challenged here, expanded the LWO to apply to that property in the city's Marina area which

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

is held by the city in trust. The *only* business subject to the Marina Amendment, and perhaps the only business to which the LWO applies at all, is Skates on The Bay, a restaurant operated by Petitioner, RUI Corp. *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1166 (9th Cir. 2004) (Bybee, J., dissenting).

This violates the Equal Protection Clause of the Fourteenth Amendment. First, the LWO singles out a narrow class to which it exclusively applies, violating the principle that laws should apply equally to all similarly situated parties. Although the language of the LWO is written so as to appear neutral, in fact it applies to a narrow minority targeted because of its political differences with the City. Namely, the refusal to unionize. *Cf. Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Second, it treats RUI differently from other businesses with no rational basis in protecting the health, safety and welfare of the people. The public welfare is not aided by applying the LWO to only a single employer in the city, or by allowing the employer to escape its requirements—and even to pay their employees less than the LWO amount—if it executes a collective bargaining agreement with the Hotel Restaurant Employees Local 2850 (hereafter "the union"). Indeed the LWOs bears no rational connection to the city's asserted interest in improving the standard of living, because its actual effeet is to stifle job creation and raise prices of goods, which harms the working poor.

The Ninth Circuit dismissed RUI's Equal Protection argument with an explicit refusal to engage in any analysis, rational basis or otherwise. This refusal presents an important question of federal law that conflicts with this Court's decisions in *Romer v. Evans*, 517 U.S. 620, 632 (1996), *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985), *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973), and others. Courts cannot blindly accept whatever justification for a law the government proffers. Rather, those

cases have held that courts must make a serious, though not strict, analysis of whether the law rationally furthers a legitimate state interest. The "anything-goes" non-scrutiny applied by the Ninth Circuit majority is that which Justice Stevens has characterized as "tantamount to no review at all," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in judgment), and which this Court has expressly repudiated.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE RATIONAL BASIS TEST IS A GENUINE LEGAL STANDARD OR IS "TOOTHLESS"

A. The Ninth Circuit Disregarded this Court's Jurisprudence by Upholding a Law That Singles Out a Small Disfavored Class to Bear an Unequal Burden

The Ninth Circuit rejected RUI's Equal Protection argument because it held that the City's decision to single out RUI was "'virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.'" 371 F.3d at 1155 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993)). But this expands the rational relationship standard far beyond what this Court and other circuit courts have held that test requires. Even under the rational basis test, a court must review the connection between the law and its stated purpose.

While it is certainly true that the government may solve problems incrementally, 371 F.3d at 1155, this must not become an excuse for unfairly burdening discrete and insular minorities. " 'Equal protection of the laws is not achieved

through indiscriminate imposition of inequalities.'" *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

In *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), this Court struck down a federal law which declared any household containing a person unrelated to another member of that household ineligible to receive food stamps. The Court held that the law was subject to rational basis scrutiny, and therefore it had to "rationally further some legitimate governmental interest," *id.* at 534, to be upheld. But the Court found that the law did not "rationally further" a legitimate interest. Although the government claimed that the law was necessary to "minimiz[e] fraud," *id.* at 535, the Court rejected "the Government's conclusion that the denial of essential federal food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns." *Id.* at 535-36.

Romer v. Evans, 517 U.S. 620 (1996), also held that courts employing the rational basis test must assess whether a law rationally furthers a legitimate interest:

> even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained . . . . [A law must be] narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it serve[s]. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Id. at 632-33. *Accord, City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985); *Zobel v. Williams*, 457

U.S. 55, 61-63 (1982). *See also Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002).

The panel engaged in no serious analysis of RUI's Equal Protection argument. By simply asserting that the rational basis test makes a law "virtually unreviewable," and failing to discuss the subject further, the panel transformed the rational basis test into "no review at all." *Beach Communications*, 508 U.S. at 323 n.3 (Stevens, J., concurring in judgment). *See also United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in judgment) ("if any 'conceivable basis' for a discriminatory classification will repel a constitutional attack . . . judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do . . . . [T]he Constitution requires something more . . . . "). The rational basis test is designed to give legislators room to act—not to give them a blank check or government power.

As Judge Birch of the Eleventh Circuit recently explained, *Romer* "stand[s] for the proposition that when all the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. And animus *alone* cannot constitute a legitimate government interest." *Lofton v. Sec'y of the Dep't of Children & Family Services*, 377 F.3d 1275, 1280 (11th Cir. 2004) (Birch, J., concurring in denial of rehearing). The correct rational basis analysis in this case would have been to determine at the outset whether requiring *only* RUI to pay its employees almost $12 per hour actually does, to some degree, bear a rational connection to redressing what Judge Wardlaw called the "skyrocket[ing]" cost of living. 371 F.3d at 1141. As explained *infra*, Part II.A-B, the answer to that question is *no*.

Once that is established, it becomes clear that the Marina Amendment is a narrowly targeted law, singling out a disfavored minority for burdensome treatment simply because of its political unpopularity. As the dissent below noted, "[t]he

smallness of the burdened class" suggests that the Marina Amendment "does not serve a broad social purpose." *Id.* at 1169. The majority below misapplied the rational basis test. This Court should grant review to clarify that the rational basis test "although deferential, 'is not a toothless one,' " *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of America, UAW*, 485 U.S. 360, 375 (1988) (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976)), and to resolve the conflict between the Ninth Circuit, this Court's Equal Protection jurisprudence, and at least one Circuit Court. *See Craigmiles*, 312 F.3d at 225 (equal protection does not allow government to burden disfavored class for no legitimate public purpose).

B. The Ninth Circuit's "Anything Goes" Scrutiny Contradicts this Court's Holding That Rational Basis Review Bars Governors from Imposing Unequal Burdens on Disfavored Minorities

Just as Congress improperly singled out a disfavored group to bear an unfair burden in *Moreno*, *supra*, and thus violated the Equal Protection Clause, the City of Berkeley violated the Clause by targeting a single disfavored group to bear the burden of paying above market wages.

Laws written in superficially general terms, but which in fact single out a particular person or group for disfavorable treatment, violate Equal Protection. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court struck down a licensing law which applied to all laundry shops in San Francisco. The law did not facially discriminate against the Chinese; all laundry facilities were subject to it. *Id.* at 368. But because the law was really "directed .... exclusively against a particular class of persons," *id.* at 373, this violated the Constitution:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and

> administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Id. at 373-74. *See also Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) ("The class character of this legislation is none the less manifest because of [its] general terms . . . .") As Justice Stevens more recently put it,

> while political considerations may properly influence the decisions of our elected officials, when such decisions disadvantage members of a minority group—whether the minority is defined by its members' race, religion, or political affiliation—they must rest on a neutral predicate . . . . The Constitution enforces "a commitment to the law's neutrality where the rights of persons are at stake."

Vieth v. Jubelirer, 124 S. Ct. 1769, 1808 (2004) (Stevens, J., dissenting) (quoting *Romer*, 517 U.S. at 623).

The *Yick Wo* Court did not hold that unequal treatment was legitimate simply because "mere" economic rights were at issue. On the contrary, the Court recognized that economic freedom is among the most precious rights that people possess. *See* 118 U.S. at 370. When government singles out a party to bear a particular economic burden, the burden violates the Constitution no less than other types of burdens.

The purpose of the rational basis test is to allow legislators to solve problems within their purview even when the solutions are partial or imperfect, without interference by unelected judges. It was not designed to insulate lawmakers from judicial review and allow them to abuse their authority under the guise of protecting the public. Only a basic means-ends scrutiny,

such as the court applied in *Romer*, *Cleburne*, *Moreno*, and other cases, can accomplish that.

C. Allowing Companies to Escape the LWO if They Have Collective Bargaining Agreements Violates Equal Protection

The Marina Amendment also violates the Equal Protection Clause by a tax on businesses that do not execute collective bargaining agreements with the union.

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), the plaintiffs argued that the City of San Bernardino targeted their buildings for selective enforcement of building codes as part of a campaign to condemn their land and transfer it to a developer the City favored. *See* 75 F.3d at 1314-15. The ninth circuit held that "creat[ing] an irrational distinction between property owners whose properties the City wanted to acquire and other property owners . . . lacks any rational basis and that the [City's] conduct, if proved at trial, would constitute a violation of the plaintiffs' clearly established rights under the equal protection clause." *Id.* at 1326-27. Like the landowners in *Armendariz*, RUI has been singled out by the City to force it to contract with the union.

The Ninth Circuit rejected the equal protection argument on the grounds that the escape provision was a " 'familiar and narrowly drawn opt-out provision[].' " 371 F.3d at 1157 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994)). But the opt-out provision here is neither familiar, nor narrowly drawn. It is not familiar, because while opt-out provisions in general exist to ensure that employees attain the benefits of collective bargaining, without being effectively priced out of the labor market, *this* opt-out provision is designed to manipulate a particular employer into bargaining with the union. Special legislation, targeting one particular party, is not "familiar." *See Romer*, 517 U.S. at 633 ("laws singling out a certain class of citizens for disfavored legal status or general

hardships are rare.") Nor is it narrowly drawn, because the LWO allows RUI to escape if it signs a *collective* bargaining agreement, but not if it signs an agreement with a *particular employee*. This means that some individuals who might "reach an agreement with the employer for certain employee benefits and employment conditions that they consider superior to, but incompatible with, the Living Wage Ordinance," may not form a contract to that effect—while the labor union can. 371 F.3d at 1157. Thus the opt-out is over-inclusive. Employees who would choose not to participate in a labor union, and would like to work for less than the LWO amount, are deprived of the opportunity to do so.

It is said that Henry Ford told customers they could have the Model T in any color they wanted, so long as it was black. The City of Berkeley has told employers in the Marina District that they may contract with whomever they wish, so long as it is the union. This sort of special interest legislation violates the Equal Protection Clause. *Cf. Craigmiles*, 312 F.3d at 224 ("protecting a discrete interest group from economic competition is not a legitimate governmental purpose.")

D. The Ninth Circuit Erred by Not Evaluating the Actual Effect of the LWO

The panel rejected RUI's argument that it was being singled out as a "class of one." 371 F.3d at 1155-56 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)). It held that "[i]t was certainly rational . . . for the City to treat larger Marina businesses differently from their competitors outside the Marina," *id.*, due to the City's maintenance of the Public Trust Marina area; the unique amenities of the Marina area; and because the public has a "limited choice of businesses to patronize" in the Marina. *Id.* at 1144-45.

But none of these justifications bear any relationship to the *purpose of the ordinance*. In *Moreno*, *supra*, the Court rejected

the government's complete denial of foodstamps to households including non-related persons because this did not "constitute[] a rational effort to deal with the[] concern[]" of fraud and abuse in the food stamp program. 413 U.S. at 535-36. In *Romer*, the Court held that the rational basis test requires "some relation between the classification *and the purpose it serve[s].*" 517 U.S. at 632-33 (emphasis added). It is always possible to list characteristics which distinguish one business from another, or one locale from another, but this does not address the question of whether categorizing the businesses by location bears a rational basis to the *asserted purpose of the law*, which in this case, is to remedy the plight of the working poor in Berkeley.

In *Cleburne*, *supra*, the Court held that the Equal Protection Clause was violated when the City refused to permit the construction of a home for the mentally retarded. In defending its decision, the City pointed out that the mentally retarded are not "similarly situated" to those who are not mentally retarded. "It is true," the Court concluded,

> that the mentally retarded as a group are indeed different from others not sharing their misfortune . . . . *But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.*

473 U.S. at 448 (emphasis added).

In other words, the court below erred by holding that the mere existence of a difference between Skates on The Bay's site and other locations in the city permits unequal treatment. Simply listing the differences between the Marina area and other places in the City does not justify the City in treating it differently. Rather, even under rational basis scrutiny, the distinction must be relevant to the legitimate government

interest so that the distinction *itself* rationally *furthers* that interest. *See further Zobel*, 457 U.S. at 61-63 (striking down residency requirement under rational basis test because it did not "rationally serve[]" the law's asserted interest); *Moreno*, 413 U.S. at 537 ("in practical effect, the challenged classification simply does not operate so as rationally to further the government interest"); *Armendariz*, 75 F.3d at 1328 (equal protection claim exists where plaintiffs "allege that city officials treated them differently . . . for a purpose unrelated to the government's interest in the activity employed to target them.").

The Berkeley LWO cannot "rationally further" the purpose of aiding the working poor, *cf. Moreno*, 413 U.S. at 534, because beneficiaries of the LWO are not the working poor, but the union. In fact, the national campaign advocating LWOs is led by labor unions. *See* Employment Policy Foundation, *Union Oversight of the Living Wage Movement*.[2] Unions employ minimum wage laws and LWOs to exclude competition and thus raise their own wages.

> [T]he people who testify before Congress in favor of a higher minimum wage . . . are not representatives of the poor people. They are mostly representatives of organized labor . . . . No member of their unions works for a wage anywhere close to the legal minimum. Despite all their rhetoric about helping the poor, they favor an ever higher minimum wage as a way to protect the members of their unions from competition.

Milton and Rose Friedman, *Free To Choose* 237 (Harvest/HBJ 1990) (1979). The same is true of the LWO, which was spearheaded by the Intervenors in this case. *See, e.g.*, Charles Burress, *Berkeley Council to Hear Competing 'Living Wage'*

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[2] *Available at* http://www.livingwageresearch.org/factsheets/unions.asp

Proposals, S.F. Chron., Mar. 15, 1999, at A13, *available at* 1999 WL 2682258 ("[City] Council member Kriss Worthington . . . said he and his co-sponsors were asked by a local labor union, Hotel Restaurant Employees Local 2850, to propose the plan.").

But the Equal Protection clause requires that

> First, courts must be prepared to declare some ends, such as economic protectionism, illegitimate. Second, in order to separate legitimate from illegitimate ends, and to ensure that legislatures do not regulate too broadly or legislate for the benefit of private parties, courts must require some fit between means and ends that is based in fact, rather than fancy. Certainly courts should not assume a roving commission to second-guess a legislature's motives, but neither should they ignore the obvious.

Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 204 (2003). Cases like *Moreno*, *Cleburne*, *Romer*, and *Craigmiles* reveal that a genuine rationality review requires just such an analysis.

II

THE COURT BELOW ERRED BY NOT APPLYING AN "ANIMUS"-BASED REVIEW UNDER THE EQUAL PROTECTION CLAUSE

While simultaneously criticizing RUI for relying on "*Lochner*-era" cases which imposed policy preferences from the bench, *see* 371 F.3d at 1151, 1157, the court below extolled at length the alleged policy virtues of ordinances requiring above-market wages. *See id.* at 1141-46. But in fact, LWOs and minimum wage laws harm the working poor. Although Judge Bybee was correct that "[t]he desirability of living wage laws is . . . irrelevant," *id.* at 1164, the majority's recitation of the policy justifications for the LWO reveal that the panel was

influenced by such considerations. Moreover, the fact that such laws necessarily harm the very people the City claims to be helping reveals that the law lacks a rational basis in protecting the public welfare.

A. LWOs and Minimum Wage Laws Make It Illegal to Hire People Who Want Jobs

As the Chairman of President Clinton's Council of Economic Advisors, Joseph Stiglitz, has explained,

> If the government attempts to raise the minimum wage higher than the [market] wage, the demand for workers will be reduced and the supply increased. There will be an excess of supply of labor. Of course, those who are lucky enough to get a job will be better off at the higher wage . . . but there are others . . . who cannot find employment and are worse off . . . .

Joseph E. Stiglitz, *Economics* 130-33 (1993) (quoted in Richard K. Vedder & Lowell Gallaway, *Does the Minimum Wage Reduce Poverty?* (Employment Policies Institute 2001)[3] at 2).

The primary problem with minimum wage laws or LWOs is that they increase the wages for those who are employed by making it more expensive for employers to hire others. Thus union members' wages are increased, but only at the cost of artificially restricting the labor supply—by increasing unemployment, and deterring job creation. As Nobel Laureate Milton Friedman put it, a law like the LWO

> requires employers to discriminate against persons with low skills . . . . Take a poorly educated teenager with little skill whose services are worth, say, only $2.00 an hour. He or she might be eager to work for that wage in order toe acquire greater skills that

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[3] *Available at* http://www.epionline.org/studies/vedder_06-2001.pdf

> would permit a better job. The law says that such a person may be hired only if the employer is willing to pay him or her (in 1979) $2.90 an hour. Unless an employer is willing to add 90 cents in charity to the $2.00 that the person's services are worth, the teenager will not be employed. *It has always been a mystery to us why a young person is better off unemployed from a job that would pay $2.90 an hour than employed at a job that does pay $2.00 an hour.*

Milton and Rose Friedman, *Free To Choose* 237 (New York: Harvest 1990) (1979) (emphasis added).

The LWO restricts the labor market "to the exclusive possession of the reduced number of workers who can be employed at the higher wage rates" George Reisman, *Capitalism: A Treatise on Economics* 382 (1996). Because this class includes a disproportionate number of racial minorities, they are the primary victims of laws which prohibit employers from hiring people at low wages. This is why Dr. Friedman has called minimum wage laws "the most antiblack laws on the books." Friedman, *supra* at 238. *See also* Mark Turner & Berna Demiralp, *Higher Minimum Wages Harm Minority and Inner-City Teens* at 2 (Employment Policies Institute 2000)[4] ("black and Hispanic teens initially enrolled and employed are 33.7 percentage points more likely to become idle following a $1 minimum wage increase."). It is certainly regrettable that some people earn low wages, but *making it more expensive to hire people is not a rational way to get them jobs.*

Research confirms these economic predictions. Although LWOs have not been around long enough for definitive research to be completed, observed job loss from minimum wage laws strongly suggests that similar results will follow

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[4] *Available at* http://www.epionline.org/studies/turner_09-2000.pdf

from the Berkeley LWO. *See, e.g.*, Donald Deere, *et al.*, *Sense and Nonsense on the Minimum Wage*, Regulation, Winter 1995[5] ("The percentage of all teenage men with jobs fell from 43 percent before the minimum wage increase to 36.3 percent after—a 6.7 percentage point decline in employment of teenage men."). A 2000 study found that a 10 percent increase in the minimum wage causes a two to six percent decrease in teenage employment. And authors of a 2000 study found that a 10 percent increase in the minimum wage would result in an 8.5 percent decrease in employment for black teenagers. Craig Garthwaite, *Testimony Before the House Subcommittee on Workforce, Empowerment, and Government Programs*, Apr. 29, 2004, at 28-29.[6] The general consensus among economists is that the minimum wage "will not decrease poverty and will limit the employment opportunities of the least skilled . . . push[ing] them further into a life of poverty and government dependence." *Id.* at 34.

> First among the reasons given for raising the minimum wage . . . is to assist the working poor . . . . [But i]f it is possible to mandate high wages, then why not also have low prices for food, shelter, clothing, and everything else that is good? Minimum wage laws focus on wages, not employment; if someone is employed, then he will receive at least the guaranteed wage . . . . The reduction in employment that results from increases in the minimum wage, which is concentrated among those workers with the fewest skills, is the cruel "dark side" of such legislation.

Deere, *et al.*, *supra*.

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[5] *Available at* http://www.cato.org/pubs/regulation/reg18n1c.html

[6] *Available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:94112.pdf

"[M]inimum wage laws can be perverse in their effects," concludes economist Simon Rottenberg. "On the surface, they will appear to many to raise the wages of the working poor. Scratch the surface, and it can be seen that such laws can have opposite consequences. They can move low-wage workers to unemployment and to less desirable employments . . . [and] regressively redistribute income from the poorer workers to those who are better off . . . ." *The Economics of Legal Minimum Wages* 6 (Simon Rottenberg ed., 1981).

All of this research simply confirms the obvious point that "an artificial increase in the price of something causes less of it to be purchased." Deere, *supra*.

There is much reason to believe that the unemployment caused by minimum wages will be mimicked by LWOs. A 1999 study by the Employment Policies Institute found that a hypothetical $10.75 LWO for the entire state of California could cost over 600,000 jobs, of which 48.9 percent would be Hispanic, and 39.4 percent would be high-school dropouts. 41.8 percent of this projected job loss would be in service occupations and 29.2 percent would be in blue collar jobs. Employment Policies Institute, *The Employment Impact of a Comprehensive Living Wage Law: Evidence from California* at 4-5 (1999)[7]. Even a study by an author favorable to LWOs admitted that they "reduce employment among the affected workers. In particular, the estimates indicate that a 50 percent increase in the living wage would reduce the employment rate for workers in the bottom tenth . . . by 7 percent, or 2.8 percentage points." David Neumark, *How Living Wage Laws*

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[7] *Available at* http://www.epionline.org/studies/macpherson_06-2002.pdf

Affect Low-Wage Workers and Low-Income Families (Public Policy Institute of California, 2002)[8] at viii.

In short, "living wage laws . . . are accompanied by disemployment effects among the potentially affected workers, pointing to tradeoffs between wages and employment. This is what economic theory would lead us to expect . . . ." *Id.* at 86-87. The absence of a rational basis in the current LWO is demonstrated by the fact that while a business may escape the LWO—and may pay its employees less than $11.37 per hour—if it executes a *collective* bargaining agreement with a union, it is not allowed to escape the LWO by executing a *private* agreement with a willing employee. This is because, were employers and employees allowed to reach agreements between themselves as to wages, some employees wish to work for less than $11.37 per hour.

B. LWOs and Minimum Wage Laws Raise the Cost of Living for the Working Poor

Minimum wages and LWOs harm the poor in other ways, too. First, minimum wage increases often do not reach the poor, since, on average, "[m]inimum wage workers are not parents struggling to feed their children. Rather, they are high school or college students living at home . . . . Only 9.2 percent of poor people of working age have full-time jobs." United States Congress Joint Economic Committee Report: *The Case Against a Higher Minimum Wage* (1996)[9]. *See also* Margaret O'Brien-Strain & Thomas MaCurdy, *Increasing the Minimum Wage: California's Winners and Losers* vii (Public Policy

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[8] *Available at* http://www.ppic.org/content/pubs/R_302DNR.pdf

[9] *Available at* http://www.house.gov/jec/cost-gov/regs/minimum/against/against.htm

Institute of California, 2000)[10] ("40 percent of families with the highest income receive 34 percent of the additional earnings [under a minimum wage]."); Richard H. Sander, *et al.*, *The Economic and Distributional Consequences of the Santa Monica Minimum Wage Ordinance* (Employment Policies Institute, 2002)[11] (under proposed Santa Monica LWO, only 7 cents of every dollar would go to a low-income worker.) Neither minimum wages nor LWOs remedy the effects of poverty. *See* Vedder, *supra*, at 16 (finding "virtually no meaningful evidence that higher minimum wages reduce poverty in the United States.").

Second, LWOs and minimum wages cause inflation. Since businesses must cover the increased cost of paying employees, they are forced to raise their prices. As with all inflation, the primary victims are the poor. Wealthy people tend to buy their products at high-end stores or producers who already pay their employees more than the legal minimum, while poorer members of society shop at stores that pay their employees minimum wage. O'Brien-Strain & MaCurdy, *supra*, at vii. Thus the price increases which offset minimum wage increases—and would offset the Berkeley LWO, if it applied to more than just one business—hit the poor hardest.

> On average, each California family pays $113 more per year for their purchases following the minimum wage increase. The exact amount . . . varies by income . . . . The richest 20 percent of families pay 34 percent of the costs for the minimum wage, where as the poorest 40 percent carry 25 percent of the burden . . . . In other words, the minimum wage imposes a higher effective price increase on the set

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[10] *Available at* http://www.ppic.org/content/pubs/R_500MOR.pdf

[11] *Available at* http://www.epionline.org/studies/sander_10-2002.pdf.

> of goods low-income families buy than it imposes on the set of goods higher-income families buy.

Id. at 37-40.

Of course, the Berkeley LWO does not apply to all jobs in the City—on the contrary, it may *only* apply to RUI. But this was intended either to offset, or to obscure, the fact that LWOs necessarily create significant costs to employers, which deter employment and raise the cost of living. *See id.* at 1159 (Bybee, J., dissenting) (citing "Greenwich study"). Limiting the Berkeley LWO to a very small class of businesses creates an illusion that the LWO helps the poor. As economist Carl Horowitz points out, studies like the Greenwich Study "demonstrate the viability of the living wage only by removing it from the context of the entire local workforce. That is, the authors are not in a position to consider what would happen if the living wage were applied to the entire local workforce . . . ." Carl F. Horowitz, *Keeping the Poor Poor: The Dark Side of the Living Wage*, Cato Institute Policy Analysis No. 493, Oct. 21, 2003,[12] at 5.

With so much evidence showing that minimum wages and LWOs are at best ineffective and at worst, seriously harm the poor by increasing unemployment and inflation, conscientious observers might wonder why the advocacy of LWOs continues. But "a partial explanation of the frequently narrow coverage of living wage laws is that such narrow laws—even if they fail to deliver benefits to low-wage workers or low-income families—benefit unionized municipal workers." Neumark, *supra*, at ix.

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[12] *Available at* http://www.cato.org/pubs/pas/pa493.pdf

CONCLUSION

The court below applied an "anything goes" level of rationality review to the LWO ordinance. Which is not warranted by this Court's decisions. Proper rationality review, while not strict, nevertheless requires an analysis of whether the LWO rationally furthers the City's asserted interest in protecting the public. The LWO, however, cannot rationally be said to aid the working poor.

The petition for a writ of certiorari should be *granted.*

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